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No. 80-1594

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

ERIKA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1.a. Respondent concedes (Br. in Opp. 8-10) that the pertinent provisions of Part B of the Medicare Act (42 U.S.C. 1395ff and 1395u) do not grant a right to judicial review of a carrier's determination of the amounts payable for particular Part B services. Respondent also concedes (Br. in Opp. 8-10) that there is not a single passage in the legislative history of Part B or amendments thereto that is indicative of a congressional intent to allow judicial review of Part B benefit determinations. Respondent contends, however, that such review must be available absent " 'clear and convincing' evidence of congressional intent * * * to restrict access to ju-

dicial review" (Br. in Opp. 7-8, quoting *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974)). Because respondent does not find clear and convincing evidence here, it contends (Br. in Opp. 7-12) that Congress cannot be deemed to have "deprived" the Court of Claims of jurisdiction under 28 U.S.C. 1491 to entertain its suit seeking greater reimbursement on the thousands of individual claims assigned to respondent by users of its kidney dialysis supplies.

This argument must be rejected. The instant suit is not one for APA-type "judicial review" of an administrative determination, which courts often presume to be available absent an expression of congressional intent to the contrary. See, *e.g.*, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). Rather, a suit in the Court of Claims under 28 U.S.C. 1491 must be one for "actual, presently due money *damages*" (*United States* v. *King*, 395 U.S. 1, 3 (1969); emphasis added). This Court has never suggested that a suit for money damages for an asserted statutory violation may be brought under the Tucker Act unless there is "clear and convincing" evidence of a congressional intent to foreclose such a suit. The rule is precisely the opposite: the congressional intent to allow a suit for money damages under the statute in question " 'must be unequivocally expressed' " (*United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and *United States* v. *Testan*, 424 U.S. 392, 399 (1976), both quoting *United States* v. *King*, *supra*, 395 U.S. at 4). Part B of the Medicare Act does not contain an "unequivocally expressed" waiver of sovereign immunity to a suit against the United States for money damages whenever a beneficiary (or his assignee) is dissatisfied with the amount of benefits the carrier

determines should be paid for particular Part B services.

b. Even if respondent were correct that a showing of "clear and convincing" evidence of congressional intent to foreclose judicial review is necessary to bar a damage action in the Court of Claims, that standard is plainly satisfied here. Respondent acknowledges that the 1965 Senate Report on the Medicare Act states that, under Part B, "carriers, not the Secretary, would review beneficiary complaints regarding the amount of benefits" and that the Act " 'does not provide for judicial review of a determination concerning the amount of benefits under Part B where claims will probably be for substantially smaller amounts than under Part A' " (Br. in Opp. 9, quoting S. Rep. No. 404 (Pt. I), 89th Cong., 1st Sess. 54-55 (1965)). But respondent contends (Br. in Opp. 10) that this sentence merely indicates that the Act is deliberately *silent* regarding the availability of judicial review of Part B benefit determinations and that judicial review under other provisions, such as 28 U.S.C. 1491, was therefore not intended to be precluded. Like the Court of Claims (see Pet. App. 13a), however, respondent conveniently fails to quote the concluding sentence of the very same passage in the Senate Report. That sentence states: *"It is intended that the remedies provided by these review procedures shall be exclusive"* (S. Rep. No. 404, *supra*, at 55; emphasis added). The Conference Report on the 1972 amendments reiterates that "there is no authorization for an appeal to the Secretary or for judicial review on matters solely involving amounts of benefits under Part B" (H.R. Conf. Rep. No. 92-1605, 92d Cong.,

2d Sess. 61 (1972).[1] Thus, Congress was anything but silent regarding the availability of judicial review of Part B claims; it unequivocally foreclosed such review.

2. Respondent argues, however, that 28 U.S.C. 1491 constitutes a general grant of jurisdiction over suits for money damages for a statutory violation wherever a federal statute " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (Br. in Opp. 6, quoting *United States* v. *Testan*, *supra*, 424 U.S. at 400, and *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). Respondent contends that the Medicare Act should be so interpreted because, in its view, "Medicare legislation, fairly read, mandates appropriate payment to providers" (Br. in Opp. 6). Having thus found a general grant of jurisdiction under 28 U.S.C. 1491 in cases where a statute provides for payment of monetary benefits, respondent concludes (Br. in Opp. 7-12) that Congress did not intend to "carve[] out an exception" (*id.* at 7) to this general grant of jurisdiction applicable to Part B Medicare claims. This analysis is seriously flawed.

Contrary to respondent's contention, the issue here is not whether the Medicare Act withdraws or carves

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[1] In *McClure* v. *Schweiker*, No. C-79-0201 WHO (N.D. Cal. Apr. 9, 1981), the court held that the hearing procedures in Part B of the Medicare Act violate due process because they permit a carrier's hearing officer to make a final benefits determination without a right of appeal to the Secretary. The court ordered that beneficiaries be afforded a de novo hearing by an Administrative Law Judge in the Social Security Administration following any adverse decision by a carrier's hearing officer. The Solicitor General is currently considering whether to authorize a direct appeal of the decision to this Court under 28 U.S.C. 1252.

out an exception to a general grant of jurisdiction under the Tucker Act over claims for monetary payments. The jurisdictional grant in 28 U.S.C. 1491 applies only where the particular statute under which the claim arises itself creates a substantive right to sue the United States for damages. *United States* v. *Mitchell, supra*, 445 U.S. at 538. Thus, the issue in this case is whether Part B of the Medicare Act creates a substantive right to sue for money damages. Respondent has pointed to nothing in the text or legislative history of Part B to suggest that Congress intended to create a cause of action for money damages and thereby to trigger the jurisdiction of the Court of Claims under 28 U.S.C. 1491.

Surely the fact that Part B provides for a carrier to pay money in reimbursement for covered services does not in itself mean that Part B "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" (*United States* v. *Testan, supra*, 424 U.S. at 400) every time a carrier allegedly errs in making a benefit determination. When Congress barred administrative appeals to the Secretary and APA-type judicial review of adverse benefit determinations by the carriers,[2] it concluded that the relatively small

[2] Respondent contends (Br. in Opp. 11) that 42 U.S.C. 405(h), which bars review of findings of fact or decisions of the Secretary except as otherwise provided in the Act, does not apply to benefit determinations under Part B of the Medicare Act because they are made by carriers, not by the Secretary. But respondent cannot have it both ways. Respondent has, after all, sued the *United States* in the Court of Claims based on the carrier's determination, and it elsewhere contends (Br. in Opp. 7) that the United States is the real party in interest in Part B benefit disputes. Therefore, for purposes of the preclusion of judicial review stated in Section

amount of money involved in the typical Part B claim did not warrant the expense and burden of a review mechanism beyond the provision in 42 U.S.C. 1395u(b)(3)(C) for a fair hearing by the carrier where the amount in controversy exceeds $100. It would be entirely inconsistent with this statutory scheme to conclude that Congress had nonetheless rendered the United States potentially liable in money damages and for the expense and burden of litigation in the Court of Claims for every allegedly erroneous determination made by the expert carriers upon which it had chosen to rely.

3. Perhaps recognizing the weakness of its argument that the Court of Claims has Tucker Act jurisdiction of a claim for violation of the Medicare Act, respondent now argues (Br. in Opp. 5-6) that its claims also are contractual in nature and therefore are within the Court of Claims' Tucker Act jurisdiction over claims arising under a contract.[3] It is true that Prudential, the carrier in this case, had a contractual obligation under 42 U.S.C. 1395u to determine and pay the amounts provided for in the Act. But a beneficiary does not enter into a contract with

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405(h), a decision by the carrier must be deemed a decision by the Secretary. Moreover, the third sentence of Section 405(h) bars jurisdiction of any action "to recover on any claim arising under" the Act; it makes no reference to the Secretary and therefore plainly applies to Part B. In any event, as explained above (see pages 3-4, *supra*), the legislative history of the Medicare Act manifests a clear intent to bar all judicial review of carrier determinations under Part B.

[3] Contrary to respondent's assertion (Br. in Opp. 5), the Court of Claims did not hold that sums were due it as a matter of contractual as well as statutory right. The Court of Claims did not even address this issue.

the Secretary or the carrier. The beneficiary's right to receive the benefits determined by the carrier to be due derives directly from the Act. Thus, there is no independent contractual right in either the beneficiary or his assignee to receive Part B benefits that could furnish a basis for Tucker Act jurisdiction in the Court of Claims when Part B of the Medicare Act itself plainly does *not* furnish a basis for such jurisdiction.[4]

4. Respondent contends (Br. in Opp. 15-16) that substantial constitutional questions would be raised if the Medicare Act were construed to bar all judicial review of statutory or constitutional issues under Part B. But this Court has never suggested that it might be unconstitutional to preclude judicial review of *nonconstitutional* issues raised in administrative determinations. See *Califano* v. *Sanders*, 430 U.S. 99 (1977). Moreover, as we explain in the petition (at 19 n.11), the Court need not decide in this case whether there is jurisdiction in some court to consider constitutional challenges to the Medicare

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[4] Respondent cites (Br. in Opp. 6) only *Fox* v. *Harris*, 488 F. Supp. 488 (D. D.C. 1980), for the proposition that it has a contractual claim to benefits. In *Fox*, the plaintiff physician alleged that he and HEW had arrived at an agreement settling a Part B reimbursement dispute for a specified sum. The court stated (488 F. Supp. at 492) that the physician essentially had alleged that this particular settlement constituted a bilateral executory contract in which the government had agreed to pay the specified sum. The court then observed that a suit to enforce that particular settlement contract could be brought in the Court of Claims under 28 U.S.C. 1491. The Court in *Fox* did not hold that there is an independent contractual right generally to receive Part B Medicare benefits that can be asserted in the Court of Claims under 28 U.S.C. 1491. In the present case, unlike in *Fox*, respondent has not sought to recover on an alleged contract settling a reimbursement dispute.

Act, because the Court of Claims found respondent's constitutional claims to be insubstantial.

5. Respondent's attempts (Br. in Opp. 12-15) to minimize the potential practical consequences of the Court of Claims' decision in this case are unavailing. The Court of Claims has now held for the first time that it has jurisdiction over Part B Medicare claims. Contrary to petitioner's assertion (*id.* at 13), the result below was not foreordained by that court's earlier decisions finding Tucker Act jurisdiction in certain Medicare Part A cases, in view of the compelling legislative history demonstrating a congressional intent to bar judicial review specifically with respect to Part B claims. Plaintiffs who find their Part B claims barred in district court because of the decisions of the various courts of appeals cited in the certiorari petition (at 20-21) may now avoid these holdings simply by bringing suit in the Court of Claims.[6]

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[6] Respondent argues (Br. in Opp. 3-4) that Prudential committed two "substantial and obvious" errors in determining the amount of reimbursement that should be paid to respondent. But if Prudential's errors were so obvious, one wonders why respondent failed to identify one of them throughout the proceedings in the court below. As we pointed out in the petition (at 11 n.5), respondent did not argue below that Prudential had erred in using respondent's price list in effect on July 1 of each year in computing respondent's customary charges, rather than computing customary charges using actual charges in effect throughout the year as ordered by the Court of Claims (Pet. App. 16a-17a). Indeed, it is entirely possible that the use of a price list in effect at the midpoint of the year would yield approximately the same level of reimbursement as a weighted average of the prices charged throughout the year. If so, the difference in reimbursement would not be "substantial," as respondent suggests, despite the added administrative burden on Prudential.

The only other relief ordered by the Court of Claims was that Prudential not rely on a particular circular or certain

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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statements by HEW officials in refusing to make a retroactive adjustment in reimbursement levels. Pet. App. 19a-21a. But the court did not order retroactive readjustment and it is not clear that respondent will receive any greater reimbursement as a result of the court's decision on this issue either.

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